

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ERNEST CHANDLER,

Defendant-Appellant.

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UNPUBLISHED  
September 8, 2000

No. 206890  
Shiawassee Circuit Court  
LC No. 96-007713 FC

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the trial court's authority to order that he reimburse the county for attorney fees for appointed counsel after he was acquitted. We reverse.

Defendant was charged with second-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Sometime before the preliminary examination and bind-over, the trial court entered an order finding defendant indigent and appointing counsel, and also ordering that defendant make weekly payments of \$45 toward his court-appointed attorney fees, beginning with his release on bond.<sup>1</sup> Defendant was, however, denied bond and was not released from jail until after his acquittal on March 14, 1997.

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<sup>1</sup> The order provided in pertinent part

. . . that defendant is to make weekly payments in the amount of \$45.00 toward his/her court appointed attorney fees, said payments to be made in the circuit court clerk's office . . . beginning upon release from jail on bond.

Should the defendant be incarcerated at the time of this appointment, he/she is to notify this court and his/her court appointed counsel upon release from jail and report any income immediately; further, defendant is to make arrangements with the Circuit Court Secretary . . . for weekly payments toward his/her court-appointed attorney fees.

(continued...)

The trial court by letter dated March 25, 1997, advised defendant that pursuant to the order appointing counsel, he was required to pay \$10,494, including attorney's fees of \$8,000; \$1,500 for a medical expert's fee; a \$750 consultant fee, and \$244 for photographs. At a show cause hearing, defendant's new counsel argued that the trial court no longer retained jurisdiction over defendant's case and that a civil action would have to be instituted to collect the debt. The trial court rejected this argument, stating that its order was issued while it had jurisdiction, that it retained jurisdiction to enforce it, and that enforcement of the order was proper under MCR 6.005.

Defendant further argued that he did not have means to repay either \$45 a week or even \$20 a week and that, under MCL 768.34; MSA 28.1057, acquitted defendants are not liable for costs. The trial court entered an order requiring defendant to pay \$10,494 at \$10 a week.<sup>2</sup> This appeal ensued.

## I

Defendant challenges the trial court's jurisdiction to enter the order requiring payment after the entry of his acquittal. Defendant also asserts that MCL 768.34; MSA 28.1057 precludes the imposition of an attorney fee reimbursement obligation upon an acquitted defendant. The prosecution relies on the court's authority under MCR 6.005(C) and case law, and asserts that MCL 768.34; MSA 28.1057 is inapplicable. We conclude that the trial court abused its inherent discretion as recognized by case law and the discretion granted it by MCR 6.005(C).

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This Court has warned against entry of orders for the repayment of appointed counsel fees *prior to* the conviction of a defendant. See *People v Washburn*, 66 Mich App 622, 624; 239 NW2d 430 (1976), and *Nowicki, supra* at 388 n 4. However, other authority seems to support such orders. See discussion of *Davis, infra*.

<sup>2</sup> That order reads:

Ernest Charles Chandler having been acquitted in the above entitled matter, however, being under a pre-existing order in this court to reimburse this court for attorney fees and related costs concerning representation in the above matter, this court having had at least two hearings on the issue of reimbursement of court-appointed attorney fees, most recently on September 22, 1997, and the Court being fully advised in the premises;

NOW THEREFORE IT IS ORDERED that defendant is to pay a minimum of \$10 per week to the clerk of the court toward reimbursement of court-appointed attorney fees, which total \$10,494, until further order of this court.

IT IS FURTHER ORDERED that the above named Ernest Charles Chandler is under a continuing duty to report income, whether declared or not, from any source to this court.

A

There is no *statutory* authorization for the court's order imposing on defendant the obligation to reimburse the county for appointed counsel fees. The prosecution does not assert otherwise. The only express authorization for requiring a criminal defendant to contribute to the cost of his defense is found in MCR 6.005(C), which states in pertinent part:

A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all subsequent court proceedings, and

(2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent. The determination of indigency must be guided by the following factors:

- (1) present employment, earning capacity and living expenses;
- (2) outstanding debts and liabilities, secured and unsecured;
- (3) whether the defendant has qualified for and is receiving any form of public assistance;
- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and
- (5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

(C) *Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require **contribution** to the cost of providing a lawyer and may establish a plan for collecting the contribution.* [Emphasis added.]<sup>3</sup>

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<sup>3</sup> The court rule contemplates contribution rather than subsequent reimbursement. The Author's note following the court rule states that subrule (C) is based on 1 ABA Standards for Criminal Justice (2d ed), Standard 5-6.2 ("[t]he ability to pay part of the cost of adequate representation should not  
(continued...)

The provisions of subsection (C) were first added to the court rules in 1989. Before the inclusion of subsection (C) in the court rules, the Supreme Court had recognized the inherent discretion of a court to order contribution in cases where the defendant is partially indigent and is able to contribute. *People v Bohm*, 393 Mich 129, 130-131; 223 NW2d 291 (1974). In reversing the trial court's determination that Bohm was not indigent, the Court said that "[w]hile the defendant is not impecunious, he is 'indigent' insofar as ability to hire a competent lawyer." The Court adopted § 6.2 (Partial Eligibility) of the ABA Standards relating to Providing Defense Services, which at that time read as follows:

The ability to pay part of the cost of adequate representation should not preclude eligibility. The provision of counsel may be made on the condition that the funds available for the purpose be contributed to the system pursuant to an established method of collection.

The standard has been amended and now reads as set forth below.

In an earlier case, *Davis v Oakland Circuit Judge*, 383 Mich 717, 720; 178 NW2d 920 (1970), the Supreme Court ordered reimbursement where a defendant failed to report assets during the determination of indigency. The Court stated:

No authority has been cited, and independent research has uncovered none, which in any way tends to impair the *selectively discretionary power* of a trial judge to apply known assets of an alleged indigent toward defraying -in some part- the public cost of providing for that indigent the assistance of counsel which § 20 (Const 1963, art 1) and the Bill of Rights uniformly guarantee. [383 Mich at 720. Emphasis added.]<sup>4</sup>

*Davis* is consistent with current ABA Standards for Criminal Justice (3d ed 1992).<sup>5</sup> Standards 5-7.1 and 5-7.2 which provide:

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preclude eligibility"). See p 5 for text of standard. "This subrule *pertains to contribution* and should not be construed as authorizing subsequent reimbursement under a different rule or statute." 6 Martin, Dean, and Webster, *Michigan Court Rules Practice*, MCR 6.005, p 21. (Emphasis added.)

<sup>4</sup> The Court reasoned that because the trial judge could have directed that the concealed funds be applied to the attorney fee during the criminal case, the judge presiding over the convicted defendant's request for return of property could properly apply the funds to the attorney fee when the funds were brought to light.

<sup>5</sup> *Davis* was consistent with standard 5-6.2 of the second edition of the ABA Standards (1986) as well, which provided in pertinent part:

(continued...)

### Standard 5-7.1. Eligibility; Ability to Pay Partial Costs

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel, or because bond has been or can be posted.

### Standard 5-7.2. Reimbursement, Notice and Imposition of Contribution

(a) Reimbursement of counsel or the organization or the governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.<sup>6</sup>

(b) Persons required to contribute to the costs of counsel should be informed, prior to an offer of counsel, of the obligation to make contribution.

(c) Contribution should not be imposed unless satisfactory procedural safeguards are provided.<sup>7</sup>

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The ability to pay part of the cost of adequate representation should not preclude eligibility [to have counsel appointed]. *Reimbursement* of counsel or the organization or governmental unit providing counsel *should not be required, except on the ground of fraud in obtaining the determination of eligibility.*

<sup>6</sup> This provision would apply to the defendant in *Davis*.

<sup>7</sup> The distinction between contribution and reimbursement is reinforced in the History and Commentary:

#### History of Standard

The title of the standard was changed, and the text has been significantly modified. The first sentence of standard 5-6.2 in the second edition, dealing with partial ability to pay, has been transferred intact to standard 5-7.1 in the third edition. New standard 5-7.2 has been divided into three subsections.

Subsection (a) continues the second edition policy against the use of "reimbursement," defined in commentary as applying "where the defendant is ordered at the termination of proceedings to make payments for the representation that has been provided."

"Contribution," discussed in commentary as a payment "at the time counsel is provided or during the course of proceedings," is implicitly approved in black-letter and discussed with approval in commentary. This policy on the use of contribution also reflects the commentary discussion in the second edition.

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Subsections (b) and (c) were added to protect procedural rights of the accused in the event that contribution is imposed. Subsection (b) contains a notice provision, while subsection (c) suggests the adoption of appropriate due process protection.

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## Commentary

This standard refers to “reimbursement” (sometimes called “recoupment”) and to “contribution.” The concepts are different, although the goal is the same in each: to obtain repayment for the costs of counsel to the state from some defendants who can afford to make such payments either because their lack of assets is temporary or because they fall just below the margin of legal indigency. It is the point in the proceedings at which the imposition of the obligation occurs that distinguishes the two terms. “Reimbursement” applies to situations where the defendant is ordered at the termination of the court proceedings to make payments for the representation that has been provided. Most states have enacted laws that authorize reimbursement to be ordered, and the Supreme Court has sustained the constitutionality of one such statute. In addition, the federal Criminal Justice Act of 1964 and several state statutes authorize a “contribution” from defendants, whereby the defendant makes payment, usually of a nominal fixed sum, for the representation provided either at the time counsel is first appointed or during the course of the trial proceedings.

Notwithstanding the constitutionality of reimbursement statutes, this standard recommends that defendants be ordered to provide reimbursement for their defense costs only in instances that they have made fraudulent representations for purposes of being found eligible for counsel. . . . there are compelling policy reasons for not routinely requiring defendants to reimburse the state or local treasury for the cost of their representation. The offer of free legal assistance is rendered hollow if defendants are required to make payments for counsel for several years following conviction. Reimbursement requirements also may serve to discourage defendants from exercising their right to counsel, and long-term duties to make payments for representation may interfere with the rehabilitation of defendants.

Policy considerations are different if defendants with limited financial resources are required to make contributions for their defense at the time counsel is provided or during the course of the proceedings. Such contribution orders do not impose on defendants long-term financial debts and normally are not entered unless there is a realistic prospect that the defendants can make reasonably prompt payments. Accordingly, contribution orders, in contrast to orders for reimbursement, are less likely to chill the exercise by defendants of their right to counsel. Because of the difference between contribution and reimbursement, standard 5-7.2 specifically precludes only

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This Court recognized a trial court's inherent authority to order reimbursement of appointed counsel fees in *People v Nowicki*, 213 Mich App 383, 386-388; 539 NW2d 590 (1995), rejecting Nowicki's argument that reimbursement was precluded because costs may not be imposed on a defendant as part of his sentence absent statutory authority. Nowicki had acknowledged liability to reimburse the county when applying for appointed counsel, had been convicted upon his plea of guilty, and had not asserted an inability to pay. In sustaining the trial court's authority to require Nowicki to reimburse the county for counsel fees, the Court observed that Nowicki's obligation to reimburse the county for legal fees and costs arose not from his conviction, but from his obligation to defray the public cost of representation. The Court noted the authority granted under MCR 6.005(C), recognizing that the rule authorizes contribution, not reimbursement, *id.* at 386-387 n 3, and concluded, relying on *Davis, supra*, and *Bohm, supra*, that the trial court had authority to order reimbursement.

In sum, MCR 6.005(C) and *Bohm* address a court's discretion to order that partially indigent defendants *contribute* to the cost of their representation, *Davis* concerns the court's "selectively discretionary power" to apply "known asserts" toward paying "some part" of the cost of representation, and *Nowicki* the exercise of the court's discretion, in the case of a convicted defendant, who had acknowledged liability to reimburse the county and had not asserted inability to pay, to order the defendant to reimburse the county \$1353 for fees and costs paid to his court-appointed counsel.

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reimbursement. Should contributions be required of defendants, however, in order to avoid interference with the attorney-client relationship, either the court or its designee, rather than the defender or assigned-counsel program, should be responsible for the collection of funds.

The standard calls for advice to the person to whom an offer of counsel is made that there will be an obligation to make a contribution. This makes clear the judge's obligation not to merely offer counsel without advice as to the consequences of accepting the offer; counsel cannot be offered "without cost" to the defendant when contribution will be part of the obligation of acceptance.

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The distinction between contribution and reimbursement is recognized by the standards of the National Advisory Commission and the National Legal Aid and Defender Association. The standards of both reject any requirement of reimbursement but state that a defendant may be required, at the time the representation is provided, to make a limited financial contribution if it can be done without causing substantial hardship. The National Legal Aid and Defender Association emphasizes that "[t]he contribution should be made in a single lump sum payment immediately upon, or shortly after, the eligibility determination."

B

In the instant case, the trial court ordered reimbursement of a large sum by an acquitted defendant who asserted an inability to pay. The trial court's order was not specifically authorized by MCR 6.005(C), because it ordered reimbursement, not contribution.<sup>8</sup> Nor was the court's order a permissible exercise of the court's inherent authority recognized in *Davis*, where assets were concealed, and *Nowicki*, where the defendant was convicted, acknowledged his liability, and did not claim indigency. These cases do not authorize a court to require that an *acquitted* defendant reimburse the county for assigned counsel fees. Assuming that the court has such authority and discretion, that discretion should be exercised cautiously. Here, the court entered the order requiring reimbursement based on a policy to require repayment to the county in *all* cases, and not on the basis of the circumstances in the instant case.<sup>9</sup>

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<sup>8</sup> The trial court considered defendant to have been under a preexisting order of contribution. While the initial order was entered during the pendency of the proceedings, the contribution obligation was based on an ability to earn income if free on bond, and did not commence under the terms of the order. Further, the order requires payment of the full amount at a minimum rate of \$10 a week, until further order of the court, imposing a liability lasting over twenty years. The order uses the word "reimbursement" and is in reality an order of reimbursement.

<sup>9</sup> The only individual consideration reflected in the record is the court's reference to its recall of earlier representations made by defendant concerning his ability to contribute to fees should he be released on bond. The court made such a reference in response to defense counsel's assertions, made during the post-trial hearing regarding the order of reimbursement, that defendant had no ability to comply with a reimbursement order because of his retirement and disability, and that defendant's wife's assets should not have to be used to satisfy the obligation. However, there is no mention of defendant's ability to contribute to attorney fees in the transcript of the bond hearing or in the motion for bond.

The initial order imposing the \$45 per week obligation in the event of release was signed September 17, 1996, before the preliminary examination and bind-over to circuit court. At the November 6, 1996 arraignment on the information, the trial court confirmed with defendant that counsel had been appointed to represent him and then stated:

THE COURT: And I think that [the appointment of counsel] was following a request by you, and as I recall we had you brought over from the jail to inquire into your indigency, and that was prior to my appointing of counsel; correct?

THE DEFENDANT: Correct, Your Honor.

THE COURT: Has anything changed?

THE DEFENDANT: No, sir.

(continued...)

We vacate the order of reimbursement, finding it to be an abuse of discretion.

/s/ Helene N. White

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In any event, the court eventually imposed a \$10 per week obligation, to be reviewed for compliance. The ability to pay \$10 per week over twenty years is not a sufficient reason to support the court's exercise of its *selectively discretionary power*, *Davis, supra* at 720, to require an acquitted defendant to reimburse the county for assigned counsel fees.